

In the Matter of Merchant Mariner's Document No. Z-402217
Issued to: DONALD E. FROMME

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

702

DONALD E. FROMME

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 code of Federal Regulations Sec. 137.11-1.

On 29 July, 1953, an Examiner of the United States Coast Guard at San Francisco, California, suspended Merchant Mariner's Document No. Z-402217 issued to Donald E. Fromme upon finding him guilty of misconduct based upon five specifications alleging in substance that while he was an able seaman in the service of the American SS WAGON BOX and acting under authority of the document above described, on or about 12 June and 18 July, 1953, he assaulted the Master of the vessel in a threatening and abusive manner; and on or about 12 June, 1953, he refused to obey a lawful command of the Master, he failed to turn to for his regularly assigned watch, and he failed to perform his duties by reason of intoxication.

At the commencement of the hearing at 1004 on 23 July, 1953, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel who was a union representative of Appellant's own choice. Appellant entered a plea of "not guilty" to the charge and each specification proffered against him.

Thereupon, the Investigating Officer made his opening statement and Appellant's counsel extensively questioned the procedure whereby Appellant was subpoenaed on 20 July, 1953, to appear as a witness at an investigation by the Investigating Officer on 22 July, 1953, before Appellant was served with a copy of the charge and specifications later on the day of 22 July, 1953, after the investigation on that date. Apparently, counsel was under the mistaken impression that the investigation was the beginning of the hearing and that the actual commencement of the hearing on 23 July, 1953, was a continuation from the investigation on the previous day. Counsel also objected to taking the testimony of witnesses on 23 July because Appellant was not represented by an attorney and had not had sufficient time to prepare his defense. When the Investigating Officer informed the Examiner that the Investigating Officer's witnesses were scheduled to sail the next morning, the Examiner stated that he would not grant an adjournment for longer than later on the twenty-third; but he assured Appellant that he would be given sufficient time to prepare his defense after the testimony of the Investigating Officer's witnesses had been taken. No adjournment was requested by Appellant or his counsel at this time, so the testimony of the Master and Chief Engineer of the WAGON BOX was received in evidence. The testimony of the Chief Engineer

substantially corroborated that of the Master. The Investigating Officer then rested his case.

Counsel's motion to dismiss the specifications for lack of evidence was denied by the Examiner. He ruled that a prima facie case had been made and informed counsel that he could obtain testimony by the appearance of witnesses or the taking of depositions. The hearing was then continued until 29 July, 1953. When the hearing reconvened on the latter date, counsel stated that Appellant would not testify in his own behalf and that no witnesses would be produced because the case had been prejudiced by the Examiner. The same union representative was acting as counsel for Appellant.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the five specifications. He then entered the order suspending Appellant's Merchant Mariner's Document No. Z-402217, and all other licenses and documents issued to this Appellant by the United States Coast Guard or its predecessor authority, for a period of six months outright and an additional twelve months on twenty-four months probation.

From that order, this appeal has been taken, and it is urged that the charges were placed against Appellant as a result of the promise of the Master, at the beginning of the voyage, to "hang" Appellant because of a claim made by Appellant for overtime for extra work performed by him.

APPEARANCES: Mr. Charles R. Abar, Port Agent of the National Maritime Union.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 12 and 18 June, 1953, Appellant was in the service of the American SS WAGON BOX as an able seaman and acting under authority of his Merchant Mariner's Document No. Z-402217.

During an inspection of the ship on 12 June, 1953, the Master found several men and eleven full bottles of beer in one of the forecastles. He broke the beer bottles and ordered the men to go out on deck and work when Appellant entered and attempted to get the other men to help him take the Master out on deck and "work him over." The Master ordered Appellant and the other men out on deck but they refused to obey the order. The Master then left the forecastle because he was in fear of bodily harm as a result of the threatening language used by Appellant. Appellant and the other men did not turn to as ordered.

Later on the same day, Appellant reported to the bridge for his watch as helmsman during his regularly assigned 1200 to 1600 watch but the Master ordered him below because of his intoxicated condition. At about 1500, Appellant was in his bunk when he was supposed to be out on deck working.

On 18 July, 1953, the Master of the WAGON BOX was conversing with the Chief Engineer on a harbor pier landing when appellant approached the Master and pushed him slightly. Appellant

then urged the other seamen with him to throw the Master overboard. Again the Master walked away from Appellant because the Master was in fear of bodily harm from the appellant. The latter followed the Master addressing threatening and abusive language towards him until the Master entered the harbor office.

Appellant's prior record consists of a one-month suspension on six months probation in December 1944, for creating a disturbance aboard ship; and a three months suspension in May, 1945, for failure to obey orders aboard ship.

OPINION

Appellant failed to produce any evidence at the hearing or on appeal to support his contention that the Master had promised to "hang" him. Appellant was afforded ample opportunity by the Examiner to produce evidence of the latter nature or in refutation of the testimony of the Master. But Appellant failed to submit any defense after the Master had given testimony in support of each of the five specifications and the Chief Engineer had given corroborating testimony. Therefore, the specifications and the charge were properly found proved by the Examiner.

It is also noted that counsel repeatedly objected to the taking of testimony on the day after Appellant was served with the charges and to the fact that Appellant was not represented by an attorney. But it does not appear that Appellant made an attempt at any time to obtain an attorney to defend himself - even when the hearing was continued from 23 July to 29 July, 1953. On the other hand, the record does disclose that Appellant elected to be represented by counsel in the person of the union representative. Ordinarily, the person charged is entitled to have more than one day to prepare his case before testimony is taken from the witnesses of the Investigating Officer. But the Master and Chief Engineer of the WAGON BOX were scheduled to sail on the morning of 24 July. Under the circumstances, it was imperative to conduct the hearing on 23 July to the extent of obtaining the testimony of these two witnesses. Appellant also had the opportunity to produce evidence on this date as well as on 26 July. Section 5(a) of the Administrative Procedure Act requires that a person shall be given "timely" notice of an agency hearing. With respect to this subsection, the Attorney General's Manual on the Administrative Procedure Act states: "Whether a given period of time constitutes timely notice will depend upon the circumstances, including the urgency of the situation and the complexity of the issues involved in the proceeding." (p.46). It is my opinion that the notice, in this case, was "timely" because there was urgent need for the two witnesses to testify on 23 July and there was no particular "complexity of the issues involved." In addition, Appellant was put on notice, to some extent, by the subpoena which was served on him on 20 July ordering him to appear as a witness at the investigation on 22 July.

Because of the seriousness of the infractions of discipline which are present when a seaman not only questions the authority of the Master but also threatens to physically abuse him, the Order will be sustained.

ORDER

The Order of the Examiner dated at San Francisco, California, on 29 July, 1953, is
AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 23rd day of October, 1953.